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RES JUDICATA

There are many different aspects to this principle of Res Judicata. The scope of this article will be limited to a consideration of the effect of a judgment as to the rights of co-plaintiffs and co-defendants, in a subsequent action between them. The article does not include cases involving the effect of a judgment in an action by one defendant against the other for indemnity, or contribution. In dealing with this question, co-defendants alone will be considered. However, the statements and cases cited are applicable with the came force to co-plaintiffs.

We will first consider the effect of a judgment in an action as to rights of co-defendants in general; then we will consider cases in which one defendant is injured by the same accident which gave rise to the previous action brought by a third party, and the defendant then sues the other defendant for damages sustained by him. There have been many cases arising from automobile accidents in relation to this latter proposition.

The general rule as to the conclusiveness of judgments as between co-parties in all kinds of actions-at-law is stated in 15 R.C.L. ¶487. Parties to a judgment are bound by it in subsequent controversies between each other, if they were adversaries in the action wherein the judgment was entered. Therefore, a judgment against several defendants is usually not conclusive as between themselves in respect to their rights and liabilities toward each other, unless defendants contest an issue with each other, either upon the pleadings between themselves and plaintiff, or upon cross-pleadings between themselves. There is also general language in this paragraph which is open to the construction, that even when in the course of litigation, unless co-defendants do in fact, though not in form, occupy the attitude of adversaries, they are barred in any subsequent action. In Comstock v. Keiting, 91 S.W. 46, the court places the above construction upon the proposition.

Black on Judgments, 2d Ed. Vol. 1, 614, states: "The doctrine of Res Judicata does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it had been fully and fairly investigated and tried, that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of the court and the jury have been brought to bear upon it."

Freeman on Judgments, 5th Ed. Vol. I, 424, 425, treats the proposition in much the same way. "As between co-defendants, the judgment adjudicates nothing which might have been but was not in fact put in issue. But if an adjudication of the issues is made between co-parties, it is Res Judicata in subsequent litigation between them even though their separate answers did not purport to raise such issue as to each other."

From these statements, then, we find that whenever issues between co-defendants are actually litigated, and actually determined

by the court, as issues between the defendants, the defendants are barred from further action.

These authorities would appear, also, to furnish some basis for the contention that when the parties contest the issue in fact, although not formally, they are estopped by the judgment. This construction is not approved by the courts of this State. This will be shown by the cases cited.

In dealing with the cases, we find that the courts of this State hold that a judgment is Res Judicata between all the parties when there are no cross-pleadings if the controversy is as to the legal status of the res in the action.

In Craig v. Wood, 3 Keyes 387, the subject of the prior action was the validity of a mortgage. The plaintiff now sues for fraud, alleging that the defendants represented the mortgage to a valid subsisting one. The plaintiff, to show that the representations were untrue, introduced in evidence the judgment roll of the action by the owner of the land to vacate the foreclosure sale, in which action the owner was successful. The plaintiff purchased the mortgage while this suit was pending. He was joined as a defendant with the present defendants. The defendants objected to the admission of this in evidence on the ground that the judgment did not assume to make any adjudication of the issues as between the co-defendants. The courts held that the objection was untenable; that the rule that parties to an action are bound by the judgment, applies as between co-denfendants as well as between adverse parties; that the parties are estopped upon every question involved in the judgment.

Much the same sort of proposition is involved in Kohly v. Fernandez, 133 A.D. 723, affirmed 201 N.Y.561. This was an action to foreclose a mortgage given jointly by the defendant and his brother. The brother brought an action for a declaratory judgment against the present plaintiff and defendant in a Cuban court to determine the validity of the mortgage. Mortgage was declared invalid. The present defendant took no part in that action. He now pleads that judgment as a bar to the maintenance of this action. The court held that it was a bar since a joint obligation cannot be void as to one obligor and valid as to the other, that any judgment that determined its invalidity as to one, must of necessity equally determine its invalidity as to the other.

The courts do not apply the doctrine of Res Judicata in cases where the actual legal existence of the res is not in question unless the co-defendants are adverse parties. To be an adverse party within the contemplation of our courts, is to be one whose rights as to the co-defendants are directly and unquestionably within the scope of the judgment,

In Leavitt v. Wolcutt, 95 N.Y.212, the action was brought to determine the validity of a clause of a will. The decedent was a defendant in a partition action. After his death, the beneficiaries, heirs-at-law, and next of kin were made party-defendants. An interlocutory judgment decreed a sale of the premises, and the

appointment of a referee to ascertain among other things, the interests of the co-defendants. The referee declared the clause of the will void after a hearing. This determination was made final by an order of the court. The present defendants, heirs-at-law contend that this judgment is a bar to the maintenance of this action by the beneficiaries under the clause of the will. The court held that the plaintiffs are barred from bringing this action; that an adjudication of the conflicting claims between the several defendants to an interest in the subject of the action, rendered upon the report of a referee, is equally conclusive between respective defendants who appeared and litigated their claims as it would have been in case of a similar issue between plaintiffs and defendants.

In Earle v. Earle, 73 A.D.300, the court held that a judgment in an action brought against the executors, present defendants, under a will was not a bar to a subsequent action by one of the beneficiaries. In the prior action, the beneficiary who is now maintaining this action was joined as a defendant. He took no part in the action. The executors were directed to pay over to the persons appearing certain amounts under the provisions of the will. The court stated that present parties were not adverse parties; that present plaintiff's interests were not considered at all; that they were not in issue since the present plaintiff did not appear. C.P.A. §246, the court held, should have been followed if the executors wished all the interests found.

Rudd v. Cornell, 171 N.Y. 114, is perhaps the most frequently-cited case. This was an action to construe a clause of a will. The defendant here alleges that she is entitled to a share of the estate under the clause in question, that the plaintiff is barred from questioning this interest by a judgment in an action of partition in which the present parties were defendants. A referee was appointed who determined among other things the respective interests of the defendants, but on the entry of the final judgment, the court did not construe the will, but merely held that all of defendants were entitled to the proceeds in a lump sum. The court held that the judgment was not a bar; that a judgment against several defendants cannot determine their rights as between themselves unless they are drawn in issue. Here none of the defendants alleged any interest which was controverted by the other defendants.

The court reasoned along the same line in O'Connor v. Yonders Co., 8 Misc. 242.

The more recent cases on this phase of Res Judicata all arise out of automobile accidents. The opinions handed down in this State are all short, so I think it would be well to refer to Snyder v. Marken, 22 A.L.R. 1275, Here the court dealt with the matter quite thoroughly. The action arose out of an automobile collision. The passenger in the one car sued the driver and owner of the other car and joined the driver and owner of the car in which he was riding as co-defendants. He asked for damages for the injuries suffered by him as a result of their alleged negligence. The judgment was for the defendants. The driver and owner of the car in which original plaintiff was riding, now sues his co-defendant. The defendant submits the defense of Res Judicata. Held. Parties to a judgment are not bound by it in subsequent controversies between each other unless they were adversaries in the action wherein

judgment was entered. Here neither of the defendants was called upon to do more than meet the charge that he was negligent so far as the plaintiff was concerned. It was unnecessary to show that the other defendant was negligent; that was the burden the plaintiff assumed. The defendants made no issue between themselves by their separate answers, nor did they attempt to do so. They did not cross swords with each other.

This is the law as it stands in the State of New York at the present time. It appears that the defendants must be adversaries in form, i.e., by the pleadings, as well as adversaries in fact. As a matter of legal reasoning, the defendants are not "crossing swords with each other", but as a matter of practical procedure, the defendants in these actions do their best to shift the responsibility for the accident upon their co-defendant. If the courts, however, adopted a different rule, much difficulty would result since the one defendant might be bound to a different degree of care as to the plaintiff in the first action. For example, take a case where a passenger on a bus sues the transportation company and the owner of the other car involved in a collision in which the plaintiff is injured. Both defendants might be found negligent as to the plaintiff, but the bus company, owing a higher degree of care to the safety of the passenger might not have been negligent at all as to the owner of the other car. It would not be good if the judgment in the former accident was held to be Res Judicata as to the contributory negligence of the transportation company, since its negligence might merely consist of failure to use the "highest degree" of care as to the passenger. The bus driver might not have been negligent as to the other car. He could have driven with due care and caution as to all third parties.

The factual situations in the cases of this State are all very similar to the one found in Snyder v. Marken. The leading case in this State on this proposition is Self v. Internat'l Railway Co., 224 A.D.239. Pullman v. Greater Laundry Co.,137 Misc.103; Trotter v. Klein, 140 Misc. 79; Glaser v. Huette, 232 A.D.119, affirmed without opinion, 256 N.Y. 686, are all so similar, it is unnecessary to do more than cite them.

In the case of Duignam v. Pawekowski,134 Misc.22, the court came to an opposite conclusion. The opinion was based on the theory that the defendants in the first action were adversaries in fact, if not in form, and therefore, the whole matter was litigated. The Glaser case (supra) was based on this same theory. This reasoning was criticized in Columbia Law Review, Vol. 30, 131. As can be noted from the subsequent decisions, the reasoning was not followed.

We find then that the law is settled in this State that in a subsequent action between the former co-defendants or co-plaintiffs, the prior judgment is a bar only if the co-parties were adversaries in form as well as in fact in the former action. The defendant who wishes to have all interests litigated should take the steps provided by C.P.A. §264. This section provides that the defendant who requires such a determination, should demand it in his answer, and should serve a copy of this answer upon each of the defendants who will be affected by the determination.

DUNTON FORT TYNAN

THE PRESUMPTION OF NEGLIGENCE IN THE LAW OF AVIATION

In 1931 an action was brought by one Charles E. Seaman, administrator of Mary Seaman, deceased, who was killed in an airplane accident which occurred at Curtiss Field, Long Island. The plaintiff's theory was that the cause of the accident was the negligent act of an overconfident pilot making a sharp turn at too steep a bank, at a low altitude, at a place where it is was reasonably to be expected that upward currents of air might tip the wing of the plane, thereby exposing its passengers to danger. The lower court in its charge to the jury introduced and submitted the question, "whether this particular accident was caused by the negligent act or action of the pilot or whether it was caused by some outside force over which he had no control. That is, whether it was due to an Act of God or to atmospheric conditions due to a wind and change of temperature which is known as an unavoidable accident." The Appellate Division, Second Department, said "that the charge was prejudicial in its failure to charge the doctrine of res ipsa loquitur, which had under the facts appearing on record, application to this case as a rule of evidence to aid the jury in passing upon the issue of liability." (Seaman v. Curtiss Flying Service Corp., 231 A.D.867). The case was sent back for a new trial and the judge charged the jury that the doctrine was applicable to the case, and the judge also allowed an exception to his charge made by the defendant on the ground, among others, that the facts based on common knowledge and facts did not warrant the inference of negligence. A verdict was again brought in for the defendant and the case was not appealed further.

What the Appellate Division said in that case was, in effect, that the doctrine of res ipsa loquitur should be applied in cases where an airplane crashes; that the crashing of a plane that was under the control of the defendant gave rise to a presumption that the defendant was negligent, and if that presumption was not rebutted so that at the close of the case the preponderance of the evidence was against the defendant, then judgment should be for the plaintiff.

Before adopting this as the rule in regard to the application of res ipsa loquitur in aviation law let us examine a case similar to the Seaman case which was decided by the same court six years later. The case was Goodheart v. American Airlines, Inc., 252 A.D. 660, and they held that the rule did not apply. The facts briefly are: the plaintiff's intestate was a passenger in an airplane owned and operated by the defendant. The plane left Newark and its destination was Buffalo. Two days later the plane was found on the side of a mountain near Livingston Manor, New York. The plaintiff alleged in that case that the defendant's pilot was negligent in that he carelessly and without necessity deviated many miles off the safe course which he was directed to follow, and took a course over a dangerous mountainous area with which he was unfamiliar, and proceeded at an unsafe altitude. The plaintiff offered proof of its allegations and the lower court submitted the case to the jury with instructions that the doctrine of res ipsa loquitur applied.

Judgment was rendered for the defendant and on appeal the judgment was reversed, the court stating that the doctrine did not apply; and also stating that in applying the rule the court ignored the plaintiff's evidence and the reasonable inferences that might be drawn from it. The case is a bit misleading since the court seems to say that the reason the doctrine did not apply was that the plaintiff relied on specific acts of negligence, and that the doctrine is inapplicable when one so relies. I do not think that that was the basic reason for the reversal of the judgment since in this State when one pleads specific acts of negligence he is not precluded from invoking the doctrine. (DeRoire v. L.V.R.R., 205 A.D. 549, 79 A.L.R.40.) But I do believe that the basic reasons for the reversal of the judgment was the fact that the plaintiff offered substantial evidence to show the cause of the accident, and, although not stated in the opinion, that the court really believed that the crashing of a plane does not, in itself give rise to a presumption that the defendant was negligent.

The foundation of my belief of what the court based its decision on is confirmed by an examination of cases prior to the Goodheart case which examination seems to me to express the judicial attitude that the crashing of a plane does not give rise to a presumption of negligence. In the case of Rochester Gas & Electric v. Dunlop, 242 A.D.625, the plaintiff was the owner of an electric transmission line and the line was carried on steel towers fifty feed high. The defendant crashed against one of these towers, damaging it considerably. The plaintiff alleged two separate counts - negligence and trespass - and offered no evidence as to the cause of the collision, but claimed the right to recover in negligence on the basis of res ipsa loquitur. The lower court dismissed the cause of action based on negligence and the Appellate Division affirmed the lower court's ruling but allowed the plaintiff to recover on the secound count, trespass. The court said "if it can be said from human experience that an airplane will not fall except through negligence then the plaintiff has proven a prima facie case under its first cause of action, - but if on the other hand common experience requires the opposite conclusion, namely that no matter how perfectly constructed or how carefully managed an airplane may be it may still fall, then the man who takes it over another man's land and kills his cow or knocks off his chimney has committed inexcusable trespass."

The judicial attitude in respect to applying the doctrine in these cases is also expressed in a Massachusetts case, Wilson v. Colonial Air Transport Co., 278 Mass. 420. In that case a passenger in a plane brought an action to recover the value of clothing and personal effects which were lost as a result of a plane crash. A few minutes after the take-off the motor stalled and the plane crashed into the water, causing loss of plaintiff's personal effects. At the close of the trial the plaintiff made the request that the testimony of one of the witnesses as to how the accident occurred constituted a case to which the doctrine of res ipsa loquitur applied. In other words the plaintiff contended that an airplane motor does not cease to function within a few seconds after taking off unless someone in charge of the motor has been careless. The lower court, Municipal Court of Boston, did not allow the application of the doctrine saying that an airplane motor system cannot be wholly dismantled and disassembled between

flights and that to hold that the doctrine applied would be "to discard as too improbable for consideration the chance that the ignition may unexpectedly have failed through the breaking under vibration of the copper strands concealed by insulation, that the generator or magneto may have failed internally, etc." The Supreme Court of Massachusetts upheld the ruling of the lower court and went on further to say, "there is at present (1932) no common knowledge of which courts can take cognizance concerning the customs or usual practice of air transport companies as to operation, inspection, and repair of their airplanes. There must be evidence. We are not, as yet, in respect to the operation, care, and characteristics of airplanes in a position where the doctrine of cases like stage coaches, trolley cars or steam railroad trains can be applied."

I think that these cases express better the rule, that the doctrine of res ipsa loquitur should not be applied, in general, to aviation accidents. The mere fact that a plane crashes should not give the plaintiff a right to invoke a presumption that the defendant was negligent. It cannot be said today, as a general proposition that plane accidents would not have happened except for the negligence of the defendant, and that is one of the prerequisites of the application of the doctrine. In the Seaman case, supra, where the doctrine was applied it would seem that the doctrine was applied not as a rule of evidence, but as a rule of public policy.

At the time that case was decided there were a great many plane accidents, 78% of which were due to negligence, and since the plaintiffs in these actions were mostly administrators, as you can well imagine, no doubt the court felt that it was a good policy to make the defendant explain the cause of the accident and to allow the jury to infer that the defendant was negligent. It is rather obvious that the plaintiff would be at an advantage if this were done. This same sort of situation occurred in California at about the same time as the Seaman case and explains the reason for the confusion in the law of aviation in that State. The California courts in early times instead of applying the doctrine as a presumption of fact would apply it as a presumption of law and treat it as an arbitrary presumption against a common carrier in favor of an injured passenger. The operation of this presumption was such as to necessitate a directed verdict for the plaintiff unless the defendant dispelled the presumption by satisfactory explanation. When the doctrine was extended to other than common carriers the presumption went along with it. Examples of this confusion may be found in Smith v. O'Donnell, 5 Pac.2d 690; Davis v. Hearst, 160 Cal. 143.

This of course is not a correct application of this rule and should not be. If it were thought that public policy demanded such an application, it is for the Legislature, not the courts, to bring it about. It would be reasonable, however, to infer from the language of the Wilson case (supra), that in the future with the improvements made in aviation, and with states adopting more and more regulations concerning the operation of planes, the court will apply the doctrine and will be able to give judicial

cognizance to the fact that accidents do not happen ordinarily unless someone is negligent.

Let us assume a case that might happen today: Suppose that it could be shown that just before a plan crashed, the wing tore off, or that just before the plane landed, the wheels fell off. Could not one of the occupants of the plane in bringing an action against the aviation company, which had exclusive control of the plane, rely on the doctrine of res ipsa loquitur since it can fairly be said today that wings and wheels do not usually fall off planes unless there is some negligence? I can see no reason why the doctrine could not be applied in such a case if it occurred today, although I can not find a case directly in point. In applying the doctrine to these situations bear in mind of course that the application of the doctrine only presents a prima facie case of negligence; that it is not necessary in invoking the doctrine to exclude every hypothesis but that of the defendant's negligence; and also bear in mind that the burden of proving negligence still is on the plaintiff. The defendant would have the right to rebut the presumption by showing, if he were able, the cause of the occurrence and that such cause is of such a character that he is not culpably negligent, but that such an occurrence is in the nature of an accident unavoidable by the use of ordinary care. If the tearing of the wing was due to adverse weather conditions, or the cause was attributable to some person other than the defendant for whose acts he is not responsible; or if he can show that his entire duty in connection with the operation of the plane was discharged, let the defendant give evidence of that fact; but allow the plaintiff to rely on the doctrine. What the court would very likely do in these cases, where it cannot take judicial notice of whether a certain accident would not have happened unless someone was negligent and when the evidence on the point is meagre and conflicting, would be to instruct the jury that if they find from the evidence that the accident is one that does not ordinarily occur except by negligence they can apply the rule of res ipsa loquitur, with a further explanation as to when the rule is applicable. This would be shifting the onus of deciding whether the rule applied on the jury, which is not at all uncommon for judges to do.

You can well imagine how important the determination of whether or not an airplane accident gives rise to a presumption of negligence is to lawyers in some states, - most notably, Alabama, California, District of Columbia, Missouri, Illinois, Montana, Kansas, and Texas. For in those states if the lawyer for the plaintiff chooses to rely on the doctrine the court may say that the doctrine is not applicable to airplane accidents and the plaintiff may be nonsuited; and if the lawyer chooses to plead specific acts of negligence, he is precluded from invoking the doctrine, for that is the law in those states. (Miller v. English, 43 S.W.2d 642). It behooves lawyers in those states to make sure if they intend to rely on the doctrine that the case is one to which the doctrine applies.

In most of the cases I have been discussing the defendant has been a common carrier, but should the application of the doctrine be different as between a common carrier and a private car-

rier? The case of Smith v. O'Donnell, supra, seems to hold that the doctrine would be more applicable to common carriers than to private carriers. In that case the court said that "in view of the very high degree of care essential under the law on the part of a carrier of persons towards those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier exercised such care, and that ordinarily when such an accident occurs, it is due to the failure on the part of the person operating the plane to use the proper degree of care in so operating it."

This interpretation of the rule seems to me to be erroneous for the presumption originates from the nature of the act, not from the nature of the relation between the parties. As it was said in Judson v. Giant Powder Co., 107 Cal. 555, "Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or reason for any such limitation of the rule of evidence." True, in determining the correctness of the rule of liability the relation of the parties is of vital importance, but is not controlling in the application of the maxim of res ipsa loquitur. (Griffen v. Manice, 166 N.Y.188).

In conclusion I think that the courts in applying the doctrine should make no distinction between public and private airplane carriers, and that with the improvements that are being made in the aviation industry, with the growth of rules and regulations concerning the operation of planes, the courts will be able to apply the doctrine, in the future, as a rule of evidence and will find no need of applying it as a rule of public policy.

JOSEPH AUGUSTUS SANTRY

The Law of Air Carriers, W. Jefferson Davis, pamphlet, (Parker Stone & Baird Co., Los Angeles, 1934).

The Law of Aviation, Henery C. Hotchkiss, (Baker, Voorhis & Co., N.Y., 1938).

INTERNATIONAL LAW AND THE CONTRABAND CONTROL

Any discussion at present of International Law or the rights and duties accruing under it must of necessity be academic, but inasmuch as the Allied Governments have attempted to justify certain activities under the Law of Nations in the present conflict, a brief examination of those activities may be of interest if not of practical value.

The basic question involved, and that which has brought forth the most protest from neutral nations, the United States in particular, is whether a belligerent nation has any right under International Law to demand that neutral vessels stop at a contraband control port and submit to a search by the belligerent government. Up to the present time, the only excuse or explanation offered by Great Britain, the principal offender, is that the end justifies the means.

No one may question the right of a belligerent nation to stop neutral vessels and search them for possible contraband. That right was established when naval commerce first became a factor in the wars between nations. The right to force a neutral ship into belligerent waters, and to undergo the expense and delay of a detailed search, is another matter. (A two-weeks delay at $600 daily is the estimated average.) We use the word "force" advisedly; the only alternative is to sacrifice the ship and cargo for the duration of war if not permanently.

The British seek to justify their action by declaring that it is impossible to stop a modern liner or freighter on the high seas and search her properly. The weather seldom permits it, and the searching vessel is placed in the danger of submarine attack. This argument appeals to the reason, until we are reminded that the alternative offered is for the neutral vessel to proceed to a belligerent port where it may be subjected to attack by the aircraft of another belligerent power, the bombs of which have little or no selectivity.

In International Law Situations, Naval War College (1934) p.53, there is an interesting comment on the suggestion that belligerents be permitted to examine the cargo of neutral ships before they sail from the neutral port. It is there pointed out that this practice proved ineffective at the time the National Prohibition Act was "in force" in this country, and moreover, that such a practice greatly favors the large nation with extensive commerce.

Under the present system of control, it would seem that the United States was in part unneutral in submitting to the plan established by the British Government. When every neutral ship voluntarily proceeds to a control station, more belligerent ships are released from blockade duty to active service against the enemy. The situation, if carried to its logical extreme, would result in a purely paper blockade, which has no recognition in International Law. A blockade in order to be binding must be effective. (Declaration of Paris, 1856. "The Olinda Rodrigues", 174 U.S. 510.)

At the present stage of the conflict, all belligerents have fallen back on the doctrine of reprisals, as they did in the World War. It is argued, with no little logic, that a nation which is fighting for its existence cannot be too concerned with the rights of neutrals. This point of view is demonstrated in a cable from the U.S. Ambassador to Great Britain to the U.S. Secretary of State, during the World War:

"They point out that we have not carried out our points (that neutral vessels should be searched at sea)---. While the official reception of our communications is dignified---they quietly laugh at our effort to regulate warfare at sea under conditions, by what they regard as lawyers' disquisitions out of textbooks." (1915 U.S. Foreign Relations, Supp.,147.)

There can be no contesting the fact that conditions have changed, but that the change entitles belligerents to strike at each other indirectly through unlawful interference with neutral shipping and commerce may well be doubted.

Two years later Great Britain issued a declaration of policy which it has tacitly renewed in World War II:

"A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory, without calling at a port in British or Allied territory, shall, until the contrary is established, be deemed to be carrying goods of an enemy origin or with an enemy destination, and shall be brought in for examination and if necessary, for adjudication before the Prize Court." (British Order in Council, Feb. 16, 1917; Statutory Rules and Orders: 1917, 953.) From the British point of view, such a presumption was founded in necessity; from the standpoint of International Law, it is both illegal and illogical. The British claimed that the German policy of unrestricted submarine warfare made this necessary. We may concede such a claim, since this article is not an attempt to justify German action, but to condemn the British invasion of neutral rights. The proposition that because the enemy acts unlawfully, Great Britain is entitled to do so, is almost too absurd for consideration. When applied to individual behavior, it has never had a place in any legal system of civilized nations; its application to the Law of Nations is certainly unwarranted.

Nor can Great Britain properly claim to be protecting neutrals against German treatment. This is not within her sphere as a belligerent, and from a practical point of view, nothing could antagonize the American citizen more than the suggestion that he needs protection from anyone.

The United States Secretary of State commented on the presumption that Great Britain had thus arbitrarily created by the Order in Council: "The language of the declaration is; 'The British and French Governments will, therefore, hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership or origin. It is not intended to confiscate such vessels or cargoes unless they would be otherwise liable to

condemnation.' The first sentence proclaims a right pertaining only to a state of blockade. The last sentence proposes a treatment of ships and cargoes as if no blockade existed. The two together present a proposed course of action previously unknown to International Law." (1915 U.S. Foreign Relations, supra, 132)

In all fairness, it should be noted that the captain of a neutral vessel who voluntarily proceeds to a contraband control station, for his own convenience and to expedite transit, cannot complain of danger or delay there encountered, nor can he object if his boat is stopped upon reasonable suspicion. But we reiterate that the mere fact that he is taking his ship to Europe does not constitute a "reasonable suspicion."

Were it not for the present neutrality policy of the United States, in excluding her ships from the war zone, (a course of action imposed by municipal law and not demanded by the Law of Nations), a serious situation might arise. The ordinary warship can not spare a prize crew to take every vessel intercepted into port. Should a neutral ship, not carrying contraband nor reasonably suspect, refuse to proceed to a control port, the only alternative would be to sink her. Were such a course pursued, a belligerent warship might order by radio all neutral boats on the seas to proceed to a control station, and then sink those that did not obey. This is obviously unlawful.

The problem of the neutral is, then, to devise a means of maintaining its commerce in view of the course of action the Allies have assumed to follow. During the last war, a group of American grain exporters suggested to Secretary of State Bryan that United States ships be convoyed by warships from our navy. This is open to the objection that contraband might then be transported under the protection of this Government, and even were the Government to examine the cargoes of ships thus convoyed, before their departure, and confiscate those goods listed as contraband by the belligerent governments, such a course of action would lead inevitably to involvement in the war.

A common practice at present is the use of "navicerts", which are certificates issued at the port of departure which state that the cargo carried is free from contraband. These have facilitated transit to some degree, but ships are still delayed for long periods. If by chance a vessel supplied with such a certificate is not stopped on the high seas, she is still compelled to stop at a control port to present the certificate. While the use of navicerts has diminished the problem to some extent, the fact remains that the very practice which makes them necessary is unlawful.

There appears to be but one practical solution: Submit to whatever the Allied Governments see fit to do, whether lawful or unlawful by accepted standards of International Law, since the only alternative is to insist on our neutral rights and fight it out. At the present stage of the war, it is apparent that the course of submission is the right one.

It may well be asked what possible use a discussion of International Law can have if the only thing the United States and other

neutrals can do is submit to unlawful interference with their trade. The writer can offer but one answer to this. It must be conceded that the United States is one of the leading nations of the world, both politically and commercially. At the risk of being condemned as an idealist we believe that if and when the present war ends, this country should be the leader in establishing a set of rules for the treatment of neutrals, and enforce them by force and reprisals when necessary. Nor do we thing that this proposition is met by the argument that the United States should stay in the Western Hemisphere and stay out of Europe's quarrels. At present, we are fortunate in being far enough away from the scene of the conflict, and can watch as interested spectators. It would be unwise, at this time, to enforce our rights as neutrals at the risk of becoming involved. But eventually, in a later war if not this one, the struggle of European countries will so affect our commerce that we must take some decisive action or cease to exist. The economic collapse of 1929 should evidence this point. The life of the United States is based on commerce, and the time has passed when we can say "Let them fight if they want to. It won't bother us." The weakness of International Law has always been that there is no power to enforce it. It is now apparent that this country must make International Law her own, and assume the task of its enforcement. In time of war, the rights of neutral nations are lightly regarded, and this country as a leading neutral should assert and enforce them.

The logical solution for the present would seem to be a refusal to supply any goods to belligerent powers until satisfactory guarantees are obtained as to the treatment of neutral shipping. The Allies need aircraft, for instance; it would be better to assert our greatest peaceful weapon, a complete embargo, and risk a temporary cessation of our commerce, until the Allied Governments realize that a war against Germany does not mean the submission of neutral commerce to British control.

GROVER NELSON NORTH

"International Law Situations - Naval War College", 1933,1934,1936.

"International Law" Fenwick. Appleton-Century. 2d ed.

A LAWYER'S PRIVILEGE

> "This court has power and control over attorneys and may censure, suspend from practice or remove from office any attorney guilty of professional misconduct or any conduct prejudicial to the administration of justice. (Judiciary Law §88 subd.2). It is for the court to fix the standard of duty for its officers and to say what constitutes professional misconduct. We are neither diffident in defining that duty nor hesitant in pronouncing the policy which will hereafter be followed. If an attorney is summoned to assist the court by his testimony at its investigation, instituted to uncover unlawful and unethical practices impairing the due administration of justice, and he refuses to answer the court's questions on the ground that his answers would tend to incriminate him or degrade him, or unless he is granted immunity, he is guilty of professional misconduct or conduct prejudicial to the administration of justice and will be disbarred." (Matter of Ellis, 258 App.Div at p.565.)

The above statement will be found as part of the opinion recently handed down by the Appellate Division of the Supreme Court of the State of New York in considering charges preferred against one Jerome Ellis that he had been guilty of unprofessional conduct. The charges had their foundation in the conduct of the respondent Ellis before a Special Term of the Supreme Court in Richmond County when that tribunal was carrying on an investigation of charges made by the Richmond County Bar Association that a practice commonly known as "ambulance chasing" was being pursued by members of the bar there. Ellis was requested to attend court and to testify. Prior to any interrogation he said that he would answer no question, disclose nothing, and he refused to waive immunity. In response to the following question, he gave the following answer: "Q. Does the Court understand your position to be that you decline to answer any question in connection with your activity in the practice of law in Staten Island on the ground that those answers will tend to incriminate or degrade you?" "A. Precisely so.

The referee, to whom the charges against Ellis were referred, decided that the attitude taken before the Special Term was a mere pretext, that the privilege had been invoked in bad faith and that the respondent was guilty of unprofessional conduct as charged. A majority of the Appellate Division affirmed the report of the referee. There was a vigorous dissent, with the minority finding no lack of good faith. Referring to that, the prevailing opinion reads: "****As heretofore indicated the minority finds that at the time the respondent asserted his privilege he had fair reason to apprehend a possible criminal prosecution. In other words, he was acting in good faith. Even if it were possible to accept this premise, our conclusion would be the same." Following this is a long argument in support of the position so taken, ending with the statement quoted at the opening of the article.

Succinctly summarized, the statement means that an attorney, finding himself a witness in an investigation such as was conducted

here, cannot assert his constitutional privilege against self-incrimination without facing disbarment for so doing. The time-honored right, so deeply reverred in our judicial system, so sincerely reverred, so vigorously defended, so jealously cherished by our courts, our people, and our lawmakers, is deemed to have fallen when the Supreme Court exercises its recognized power to scrutinize the conduct of its officers. The situation is that the honor of the court is arrayed against the constitutional right of the individual and the majority of the court in the Ellis case, claiming to be supported by reason and authority, arrives at the conclusion the integrity of the court must prevail.

It is of the utmost importance that the court be right, if it is to pursue the promised policy in the future. An unwarranted invasion of the constitutional privilege against self-incrimination is a telling and disastrous blow at one of the sturdiest columns supporting our judicial system; any failure on the part of the court to exercise its full power over attorneys will likewise be a disintegrating force in the stability of our judicial system. Blind and excessive devotion to the privilege, or an overzealous regard for the integrity of the court; either, is fatal to the preservation of justice as we know it. Deeply conscious of all this and firmly convinced that the court came to its conclusion by calm reasoning rather than that it was moved by rampant enthusiasm for its duty, we feel that the decision was erroneous and that the privilege should prevail.

Let it be understood at the outset that there is no doubt that the exercise in bad faith of the privilege sought to be defended here comes under the heading of unethical conduct. For such a flagrant defiance of the court, the attorney must be uncompromisingly punished; for such prostitution of privilege, he must be almost summarily divested of his office. "No question of constitutional right to remain a member of an honorable profession arises when an attorney delays or impedes justice by the contumacious assertion of spurious privileges." (Matter of Levy, 255 N.Y. at page 226.)

In answer to the contention of the minority that respondent's refusal to answer was sanctioned by the State Constitution Art.1 §6, and by the statutes (Code of Criminal Procedure §10; Civil Practice Act §355), the court states: "We answer that there is no constitutional barrier which prohibits or prevents this court from vindicating its honor. The respondent seeks shelter behind these enactments and the minority holds that he is protected by them***** We do not share this view. We recognize that the respondent has a dual status; he is here not only as an attorney but also as a citizen. We assume that all constitutional privileges inure to the benefit of lawyer and layman alike. Nor do we hold that any rights guaranteed the respondent as a citizen are denied him as an attorney. If we did, the persuasive and decisive utterance of the distinguished jurists, quoted in the dissenting opinion would be pertinent. Here there is no constitutional right involved. Respondent has no constitutional or statutory right to his office as attorney."

That a lawyer has no constitutional nor statutory right to his office is not open to dispute. The court properly fortifies

its opinion by quoting from Matter of Rouss, 221 N.Y. at page 84: "Membership in the bar is not a right but a privilege; a privilege burdened with conditions." By its declaration the court has conditioned membership in the bar to the extent that the lawyer must abandon his constitutional privilege when questioned by the court as here, or else forfeit his office. In its premise the court declines to distinguish between lawyer and layman, yet the effect of the conclusion reached is to make that very distinction. The question here is not whether the court violates the Constitution when it disbars, but rather whether it goes beyond constitutional limits when it imposes the condition it does here and sets up disbarment as a penalty for the violation thereof. Courts derive their powers from the Constitution and this power to control attorneys was meant to be conferred on the courts by the Constitution, yet was this grant so broad, so sweeping as to override the specific privilege against self-incrimination granted to all citizens by the fundamental law? The constitutional question here is whether the court can, in the exercise of its office to determine what is proper professional conduct, say that a citizen, once he assumes the role of an attorney, is no longer able to invoke the privilege against self-incrimination when the tribunal is conducting an investigation of its officers and such invoking of the right is a contempt of court for which the lawyer may be subjected to discipline. To answer the question affirmatively is to state that the necessity for this plenary power of the court to keep its house clean is greater than the necessity for the continued extension of the privilege under discussion to every citizen, no matter what his status; to answer in the negative is to assert that justice is better served by allowing the right to remain and that the Constitution of the State of New York, with its guarantee against self-incrimination, forbids the court to impose the condition it did here on membership in the bar.

No one can quarral with the proposition that here is a compelling necessity that every member of the bar posses a character that is beyond reproach. A genuine respect for the law and for the court before which he appears should be entertained by every attorney. His every act, professional or otherwise, must reflect that feeling. Indeed, the stability of our judicial system as an agency for the preservation of justice and for the protection of individual rights gains or loses strength as the standards of the bar rise or fall. It is incumbent upon the court to keep aloft these standards and the power and control over attorneys commensurate with the obligation has been universally bestowed on our tribunals. Hesitation there would be in decreeing such a power limited, yet we feel that it is limited by the very fundamental law from which it is derived.

Glancing now at the other side of the problem, we find that the purpose of the privilege against self-incrimination has been, and is, to prevent the forced examination of an accused person by the court or prosecutor. Experience has proved that such inquisitorial proceedings lead to appalling abuses which mock the very justice the court seeks to dispense. The zealous prosecutor, once given the right to interrogate, may descend from mere questionning to brow-beating and extortion. Once he can pursue this method of procuring evidence, motivated by a thirst for conviction, he will ensnare, he will harass, he will torture the witness until the

desired self-incriminating answer is forthcoming. Little inclination will there be to resort to independent inquiry, if this avenue of approach be open. The privilege against self-incrimination arose in England because the practice mentioned here was prevalent and it is in fear of a recurrence that the people of England and America have seen fit to preserve for themselves the right. To be sure, many a guilty person has been able to avoid just punishment by relying on this constitutional right, yet that defect can be overlooked in the light of the ample protection that has been afforded the innocent, for whose benefit, after all, the privilege exists.

The protected silence of the accused has often impeded prosecution, has hampered the administration of true justice, has allowed the guilty to escape his just deserts. Legislative bodies have often seen fit to declare that the privilege of silence be removed in order that a cause be expedited, yet in all these instances, such a gesture has had sanction only where there was preserved to the individual the constitutional immunities against punishment for crime. (Counselman v. Hitchcock, 142 U.S.547; People v. O'Brien, 176 N.Y. 253). The dissenting opinion in the case under consideration quotes from Matter of Doyle, 257 N.Y.244: "The privilege may not be violated because in a particular case its restraints are inconvenient or because the sole malefactor may be the subject of public execration, or because the disclosure of his wrongdoing will promote the public weal. It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overlap it."

The Legislature has been directed to protect the innocent if it deems that silence should be broken. Has not the court the same obligation to the attorney? The constitutional way is not to demand forfeiture of office but rather to grant immunity to the witness, for then the innocent shall be protected and at the same time the guilty exposed. Then the latter can be properly disciplined. Such a method will insure the preservation of the integrity of bar and, at the same time, will not entail a disregard for sacred rights. Presume Ellis guilty of crime and the conclusion of the court as to the privilege is correct. However, it is the opposite presumption in which we must indulge, and, therefore, we must reject the stand of the court. Until there be some constitutional change, the guilty lawyer must be allowed to escape disbarment in order that the innocent man be not questioned as to things which might incriminate him. As the minority says, "The fault is with the law; in the law the remedy must be found." It is not our purpose here to hold a brief for or against the necessity for that change but we do say that the desired result cannot be accomplished by an unconstitutional shortcut.

Reading further in the Ellis case, we find that the minority, in striving to uphold the right of the lawyer to assert his privilege in good faith quoted the following from the opinion of the late Judge Cardozo in People ex rel. Karlin v. Culkin, 248 N.Y. at page 471: "We are now asked to hold that when evil practices are rife to the dishonor of the profession, he may not be compelled by order or rule of the court, whose officer he is, to say what he knows of them, subject to his claim of privilege if the answer will expose him to punishment for crime." In that case, the attorney

challenged the power of the court to conduct a general inquiry into the profession concerning unethical practices and it was there held that the court had such power, and that the attorney questionning that power was guilty of a contempt. Referring specifically to the limitation "subject to his claim of privilege", the minority says, at page 574: "By that was meant the lawyer was not subject to punishment if he asserted his constitutional privilege****. Surely the distinguished jurist could not have intended to decree amnesty in the written word, with a mental reservation that one may claim the privilege as a matter of right and have done a wrong which subjected him to discipline."

This view of the matter is rejected by the majority at page 565. After making reference to the stand quoted in the foregoing paragraph, the court goes on thus: "With due respect, we believe the writer meantjust that because he stated: 'There are many forms of professional misconduct that do not amount to crimes; even when they do, disbarment is not a punishment within the meaning of the criminal law.' The writer also knew that 'The courts have repeatedly held that the constitutional privilege does not apply where the testimony sought to be elicited may lead to disbarment'." Matter of Becker, 229 App. Div. 62-76. To our mind the argument fails to show the writer in the Karlin case was not of the mind attributed to him by the minority. The statement as to disbarment not being a punishment for crime did not originate in the Karlin case, but was therein quoted from an earlier opinion by the same writer, in the Matter of Rouss, supra, at page 85. A reading of the case discloses that the statement was made in reaching the conclusion that a confessed criminal who had been granted immunity from criminal prosecution could still be disbarred. There, there was simply a holding that the respondent Rouss was asserting a privilege which was not his and that his conduct, criminal and unprofessional at the same time, was still subject to the scrutiny of the court and that he could still be disciplined for his wrongdoing. Upon observation of the circumstances under which the statement was uttered, we reach the conclusion that, as regards the privilege under discussion, it fails to show that the jurist was of the opinion attributed to him by the majority in the Ellis case. The conduct of Rouss has been revealed and he was attempting to assert a privilege that was not his to assert. Disbarment there was to follow because of acts revealed. All possibility of criminal prosecution had passed. Ellis is in a far different situation. His acts are not yet laid bare, and if they are laid bare, criminal proceedings might result. To avoid that, he asserts a privilege which is unquestionably his, and discipline is to follow - not for any act revealed, but for the mere exercise of the right. So different are the cases that it is hardly logical to use the statements of the jurist in the first as indicative of his mind in the second.

The quotation from the Becker case can be qualified by a reference to the opinion of Judge Cardozo in the Rouss case, supra, at page 86. As stated above, he was there demonstrating that a disbarment action was not a criminal proceeding and that the accused could not avoid discipline by refusing to reveal his unethical acts. He says: "A proceeding looking to disbarment is not

a criminal case. We do not suggest that the witness is protected only when testifying in the criminal courts. But to bring him within the protection of the Constitution, the disclosure asked of him must expose him to punishment for crime." Here was a qualification of the statement about testimony in disbarment proceeding; the testimony is limited to that which would not expose to crime. Hence, to determine his meaning of the remarks in the Karlin case by reference to those in the Rouss case is to make a futile gesture, for the former are but an iteration of the latter. The task of interpretation remains. The court has failed to show that the late chief judge did not use the word "privilege" in the comprehensive sense as indicated by the minority.

However, the court proceeds to lay the foundation for its conclusion by claiming that a reading of the whole opinion in the Karlin case reveals the jurist's position to be as claimed. In that case the court traced the origin of power of the court to investigate the attorneys, and the way the control was exercised in England. The majority quotes him, at page 565, as follows: "If a barrister was suspected of misbehavior, the benchers of his inn might inquire of his behavior. We can hardly doubt refusal to answer would be followed by expulsion. Short shrift would there have been for the barrister who refused to make answer as to his professional behavior in defiance of the visitors." They further present his remarks at page 566; "If the house is to be cleaned, it is better for those who occupy it than for strangers to do the noisome work." (People ex rel. Karlin v. Culkin, 248 N.Y. 472, 480).

We feel that these remarks of the court can readily be reconciled with the contention of the minority when we consider that the question in the Karlin case was whether the court had the power to conduct a general inquiry into the activity of the bar. The eminent judge was endeavoring to prove the power of the court to inquire generally, subject to the privilege. His words, as quoted, bore well on that point but to glean from them a belief that the court can force an attorney to abandon a constitutional privilege is to give them a construction they will not bear.

The court believes its policy "to be in keeping with the present public policy of the State" and points to the recent adoption by the people of a constitutional amendment providing that a public officer who refuses to sign a waiver of immunity or any questions asked in regard to the conduct of his office, shall be removed from office (N.Y.Constitution Art.1 §6).

Does it follow that the people will take the same stand concerning the question of a lawyer and his right to invoke the privilege? Assuming for the moment that a change is necessary, is it not a wiser step to call upon the people to express their sentiments than to deduce what they are? Once shown the need for change, the people might well react as they did in the case of the public officer. Yet, to anticipate such reaction as justification for the soundness of the policy pursued here seems hardly prudent.

But the court feels that no amendment to the fundamental law is necessary in the case of the lawyer as with the public officer, for the former has a right to his office while the latter holds his as a privilege. In the light of our previous discussion as to whether the court has the right to impose forfeiture of privilege, or of office, as a condition of membership in the bar, we feel that the distinction offered is not well founded and that the amendment is necessary.

Concluding, we take the position that the policy of the court, as announced in the opening paragraph of this article is out of harmony with the fundamental law of the State. No contention is made that the policy should not be followed once the constitutional barrier is surmounted, but until the obstacle is removed, the right of the lawyer to invoke his constitutional privilege against self-incrimination must be preserved to him. To that right, the court, in conducting its investigation of its officers, must yield.

JOHN JAMES McCALL

REMOVAL OF JUDGES

Probably no other single case has focused so much attention upon the present unwieldy and inefficient method of removal of judges in New York State as did the recent trial of Judge Martin by the Senate last fall. The seemingly unnecessary delay in the proceeding and the expense (over $140,000), with their attendant publicity, brought home quite forcibly the weakness of our judicial organization. The inevitable result was a wholesale dissolution of the idea of "justice pure and unsullied" which years of patient endeavor had created in the public mind. Senator Thomas C. Desmond, speaking over WGY at Union College, said, "Present machinery for removal is too cumberson****. It has repeatedly happened that although practices which should be good cause for immediate removal of a judge have been brought to light, no explicit provisions of the law make these acts grounds for removal. Offending judges have thus escaped punishment, and public confidence in the integrity of the bench has suffered a severe shock."

A great deal of care has been applied to organizing a system for the selection of judges, and this is proper. On the theory that a stitch in time saves nine, selection is the first consideration in establishing courts on the basis of efficiency. But no system of selection absolutely protects against mistakes or against the problem of removing judges unable to fulfill their duties because of mental or physical disability.

Secure tenure is an essential element to attract competent men to ghe bench and give them that independence necessary for fair and impartial performance of their duties. Even if this should allow a few corrupt judges a shelter, it still predominates for the majority upon whom most of the burden rests. But security should be for as long only as a judge is fit, subject to termination whenever he is incapacitated or shows himself incompetent, neglectful, or morally unfit.

Trial judges need supervision far more than any others. They sit in hotly-contested cases where more depends upon the ability of a single individual than in the case of most other officers. They are subjected to more nervous strain and frequently become high-handed, arbitrary, and abusive in their discretion. It is into a trial court that the average citizen comes for justice and receives his first impressions of American institutions. Through a trial judge the bench may suffer a serious impairment of reputation and public trust.

However, our present system is entirely without adequate means of weeding out incompetent men. The authority of a judicial officer may not be affected by his physical or mental ability to perform the functions of his office. (33 Corpus Juris §48) Judges can be removed only by an authority upon whom the power of removal has been conferred by law, (U.S. v. Malmin, 272 Fed. 785) -only upon the grounds enumerated in the Constitution, and these are strictly construed. (People v. Luce, 74 Misc. 551, aff'd 148 A.D. 933). Courts have repeatedly held that consistent wrong decisions and mistakes must be wilfully made or corruption shown to constitute grounds for removal. (Re Bolte, 97 A.D.551; Re Tighe, 97 A.D. 28; Re Baker, 94 A.D.278).

Although §132 of the Code of Criminal Procedure authorizes the Appellate Division on its own motion, or on petition, to investigate the inferior courts, (Re Handler v. Berry, 138 Misc.584) such a formal action is apt to be taken only when it is already known that serious conditions exist. The court did not feel warranted to investigate the Magistrates of the City of New York, in spite of the public petition forwarded by the Governor (Re Roosevelt, 232 A.D.23). There is an obvious need of some method of removal for non-culpable inefficiency.

The history of the Judiciary Article of the Constitution is not complicated. There have been few changes since its inception. But when one considers the difficulty of effecting a radical change in the Constitution, and the natural hesitancy to upset an established system by which one of the three fundamental branches of our Government operates, its endurance is easily understood. In the Convention of 1777, so as to establish the Judiciary on a permanent foundation, free from political interference or control, tenure was for life, "during good behavior", or up to sixty years of age. Judges were subject to removal from office only by impeachment. By 1821 it was apparent that impeachment was far too rigid, and by Article 1 §13, those holding office during good behavior were liable to removal by a joint resolution of both houses of the Legislature. A two-thirds vote was required in the Assembly while a bare majority sufficed in the Senate. The additional requirement that notice of the charges must be served upon the offending judge and that he be given an opportunity to be heard was added in 1845. In the following year Article 6 §11, much like the present Article, combined these existing ideas and provided that justices of the Supreme Court and Judges of the Court of Appeals be removed by a joint resolution of both houses (two-thirds vote in the Assembly and a majority in the Senate) while Surrogates and others, except justices of the peace and judges and justices of inferior courts not of record, be removed by the Senate upon recommendation of the Governor. The cause was to be entered on the journal, the complaint served upon the offender, and an opportunity to be heard presented to him. Two years after the Convention of 1867, the Article was changed so as to require the concurrence of two-thirds of each house upon the joint resolution, and the word "charges" substituted for "complaint." In 1894, they substituted "statement of causes" for "statement of charges." The only other change since that time was a minor one in 1925, made pursuant to a case decided by the Appellate Division, First Department, in 1920, which held that although the Legislature made the Municipal Court of the City of New York a court of record, (Chap.279, Laws of 1915) it was not so at the time of the adoption of the Constitution, and they could not deprive the Appellate Division of its authority and jurisdiction over justices of these courts. (Re Levy, 192 A.D.550, affd 229 N.Y.637.) Therefore justices of the Municipal Court were placed within the exception of Article 6 §11. The Constitutional provision concerning removal now reads as follows:

"Article 6 § 9. Judges of the Court of Appeals and justices of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace, justices of the Municipal Court of the City of New York, and judges or justices

of inferior courts not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journal, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal."

Article 6 §17 provides for removal of justices of the peace, judges or justices of inferior courts not of record, and their clerks, for cause, after due notice, etc., by such courts as are prescribed by law. The Appellate Division has this power.

From these facts alone it would be difficult to discover changes which appear to be definitely aimed at the correction of any glaring weakness exposed by this method. But as can be imagined there was no such apparent satisfaction with the Article. As early as 1821, when removal by joint resolution was first adopted, the Common Legislative Department advocated a method of removal to secure responsibility where judges were not guilty of such misconduct as to make them liable to impeachment. It was recognized that impairment of faculties by casualty, sickness, infirmity, and intemperance would in many cases render the removal of a judge expedient. However, those who opposed placing any but the most restricted means of removal in the hands of the Legislature, were in the majority. Their objections were based on the ground that judges occasionally had to pass upon the constitutionality of a law, and that making them too dependent upon the Legislature would result either in hampering the freedom of their decisions or in subjecting them to the vindictiveness of the party in power. I do not think the soundness of these objections can be questioned, but the purpose of the advised amendment had equal or greater merit.

Again, in 1864, an effort was made to add "inability to discharge the duties of his office arising since his election" to the grounds for removal, but this was defeated. The last indicative move by a convention was the change of the word "charges" to "causes" because a recent decision handed down by the Court of Appeals had construed "charges" as culpability or malfeasance and had interpreted "causes" to embrace incapacity to perform duties. The connection of the two facts clearly shows an intention to effect a higher standard of accountability for the bench.

The discontent with the Judiciary Article following the Convention of 1915 resulted in the creation of the Judiciary Constitutional Convention in 1921. The revision of the entire method of removal was considered. The ideas then proposed are contained in the Model Judiciary Article submitted by a committee of nine, established prior to 1921. That article provided for a separate committee on discipline, elected by the justices, and consisting of five of their number. The committee was to have the power to discipline or remove judges, referees, clerks and members of the bar. The article was not adopted by the Convention. In 1934, the Judicial Council was established (Jud.Law §§40-48). It was composed of lawyers, judges, and legislators charged with the duties of making a continuous survey and study of virtually all matters affect-

ing the efficiency of the courts. This was a fact-finding and policy-forming group, rather than a body with administrative and regulatory powers.

These repeated proposals indicate that the people have, in the past recognized the desirability of a change in the supervision and control of the judiciary, but unfortunately no action has as yet been taken.

The methods of removal in use today are removal by executive action, removal by legislative action, removal by judicial action, recall, voluntary retirement, and compulsory retirement at a fixed age.

Removal by executive action and recall may be treated very briefly. While either or both are attractive in theory, the practical value is small. The outstanding advantage of executive control is its ability to cut red tape and effect its results speedily. Although speed is a distinct asset in ridding the bench of judges unfit to hold office, it is hardly worth the sacrifice of placing the judiciary directly under the influence of the executive branch of government.

Likewise, recall is only workable effectively under idealistic circumstances. Flag-wavers may shout themselves hoarse over the advantages of allowing the citizens to express their choice at the polls, but it is a matter of common knowledge that the electorate has little or no information upon which to base its decision. Petty reasons, friendship for the incumbent's opponent, ill feeling about an adverse decision, and other irrelevant factors sway the election. The public rarely knows any facts as to the health, fairness, dispositions or conduct of the contestants and are not in position to pass upon their expert ability or qualifications. Everything but fitness is in issue; judges are forced to become politicians, and in many instances extremely capable men are ousted in a political landslide. Bar associations have tried recommending candidates to no avail. The best method of electing judges is to have the incumbent run against no other candidate, only the question as to his remaining in office being in issue, at a separate time from the regular elections. Even there, no great degree of discrimination is to be expected and this method is only available at rare intervals, namely, at the termination of his office.

Removal by legislative action is almost as undesirable. Only fourteen states at the present time depend solely upon impeachment as a method of removal. Such a procedure always entails a tremendous expenditure by the Government, for it must bear the expense of clerk hire, the expense of bringing witnesses to the trial, the expense of hearings, counsel fees for the State and ordinarily for the defendant judge, salaries and traveling expenses of the members of the Legislature, and countless other items. On top of this, it is extremely slow compared to other methods, and it is not effective in its operation. Neither house is adequately organized or equipped to hear proceedings of a judicial nature. Partisan motives prevail, and the evidence necessary to swing two-thirds of such a group is exceedingly difficult to obtain. The grounds for removal by impeachment or legislative action are very narrow and

fall way short of embracing moral delinquency or wrongdoing. It is almost always regarded as penal and causes for removal specified in the Constitution are restricted to various forms of conduct in office. The offense is rarely grave enough to be a crime.

Wherever impeachment is used there has been an incredibly small percentage of removals. Its sole accomplishment is to serve as a very occasional warning. Of course, where such a large and unwieldy body, composed almost entirely of men untrained in judicial matters but steeped in politics, is used in a quasi-judicial capacity, it is only to be expected that the discretion necessary to effect justice will degenerate into a mere partisan or emotional determination. If impeachment were expanded so as to be available for removal on all the grounds necessary for the maintenance of a high standard of judicial ethics, it could, and undoubtedly would become a tool in the hands of politicians against judges who have refused to yield to political pressure.

Voluntary retirement with or without provisions for pension and part-time service after retirement is unsatisfactory without some method of compulsory retirement as an ace in the hole. A fixed age limit for retirement has the advantage of being an impersonal method and the disadvantage of application to men who do not age equally at the same time. A careful selection of the proper limit will bring about a balance between loss of manpower and elimination of dead timber. New York's age limit of 70 years (Art.6 §19) is generally considered proper to maintain such a balance.

We now come to the consideration of removal by judicial action. This system, where used, has been found to be fair and effective. France, in 1883, established a judicial council of seven whose duty it is to retire judges for disability, and they find their method satisfactory. Virtually all the proponents of changes in judicial organization in regard to removal are in complete accord as to certain fundamental theories upon which the change should be based. The most successful procedure must be one which may be put into operation without undue delay, and one which insures for the judge a fair hearing before a tribunal free from partisan bias and unaffected by waves of public passion. These are embodied in the many advantages of removal by judicial action.

Making judges and justices of inferior courts subject to removal by a superior court, appeals to reason and logic, since a court is obviously better fitted to pass upon the qualification involved. Professor Burke Shartel of the University of Michigan Law School, in his article on Retirement and Removal of Judges, says, "A tribunal constituted of judges is able to dispose of disciplinary matters expeditiously; it is fitted by training and experience to try questions of fact; it is closely associated with problems of administering justice and is confronted daily by problems of judicial ethics, which should give it the proper appreciation of the conduct of any judge accused of malfeasance in office as well as sound estimation of those qualities which would be involved in a compulsory retirement on account of age or health. Cases of retirement or removal necessarily involve discretion." (20 J. Am. Jud. Soc. 133 at 141).

A judicial proceeding is the only form entirely consistent with the security of tenure necessary to attract better men and render them independent to make fair and free decisions. Judges are assured of a trial before a body with respect for judicial standards of conduct. Arbitrary removal by any other method destroys the safety of a judge who is honest and efficient.

The opposition to a concurrent resolution for such removal, introduced in the New York State Senate in the 1940 session was based mainly on the mouth-filling phrase "Judicial Oligarchy." If such were the result, I fail to see the harm involved. The Court of Appeals, whose job it would be to discipline and remove judges is, under the proposed amendment, still under the present system of removal itself.

This is the only practical solution, since it is impracticable to allow judges of a court to have the power to remove their colleagues. All harmony would disappear. A judge of the Court of Appeals, however, is so much in the public eye that actual ouster is more likely in case of misconduct. There would be no "judicial oligarchy" in the sense in which the opposition tries to imply. The duties of a judge, and the high standards of his office make the judiciary an entirely different problem from any other branch, and not only allow but necessitate an organization which would be unreasonable in the others. "Where judges may only be removed by a judicial body is regarded as the very charter of judicial independence." (Shartel, supra).

The concurrent resolution sponsored by Senator Desmond to amend §§9 and 17 of Article 6 of the Constitution embodies the ideal method of removal. It abrogates the part of §17 quoted above and proposes the following addition to §9:

"Article 6 §9. ---Notwithstanding the foregoing provisions, a justice of the supreme court, a judge of the court of claims, a surrogate or special surrogate, a judge of a court of general sessions, a county judge or special county judge, or a justice of the city court of the city of New York, may be removed for cause or may be retired for permanent mental or physical disability preventing the performance of his judicial duties, by the court of appeals after a public hearing in banc, either upon its own motion or upon the recommendation of the appellate division of the department within which the justice, judge or surrogate shall be so removed or retired unless he shall first have been served with a written notice of the proceeding therefor and a statement of the cause or disability alleged and shall have been given an opportunity to be heard. Removal for cause shall be upon the concurrence of five of the elected judges of the court of appeals.

"Justices of the municipal court of the city of New York, judges and justices of all courts of inferior local jurisdiction, of children's courts and courts of domestic relations, and justices of the peace and police justices may be removed for cause or may be retired for permanent mental or physical disability preventing the performance of their judicial duties, by the appellate division of the department within which the judge or jus-

tice resides, after a hearing as hereinabove specified for removal or retirement by the court of appeals.

"Judicial officers retired for disability in accordance with this section shall receive thereafter such compensation as the legislature may provide."

Laymen and lawyers alike should take an interest in revising our judicial organization so as to secure the purpose suggested by the Preamble to the Canons of Professional Ethics of the American Bar Association. "The future of the Republic, to a great extent, depends upon the maintenance of Justice pure and unsullied."

RICHARD FREDERIC SCHWERZMANN

Problems Relating to Executive Administration and Powers; New York State Constitutional Convention Committee, c. 1938, p.216.

Problems Relating to Judicial Administration and Organization. N.Y. State Constitutional Convention Committee, c.1938, (p.186).

Retirement and Removal of Judges, Burke Shartel, 20 J.Am.Jud.Soc.133

31 Ill.L.Rev. 631.

Intro. to American Government, Ogg and Ray, c. 1923, pp 453, 823.

N O T E S

IS THE NEGLIGENCE OF THE DRIVER OF A CAR IMPUTABLE TO OWNER? Can the owner of a car which was driven by a person who had permission under §59 of the Vehicle and Traffic Law, but who was at the time using it for his own private purpose, recover from a third party the damages to his car if both drivers were negligent? In other words, is the negligence of the plaintiff's driver imputable to the owner under §59?

In Mills v. Gabriel, 259 A.D. 60, the Appellate Division, Second Department, held that the defendant could not set up the negligence of the plaintiff's bailee in an action by the owner of the car.

Let us examine the court's reasoning. Justice Johnston, writing the majority opinion of a court divided four-to-one, stated that at common law "respondeat superior" was the only doctrine by which negligence could be imputed to the owner of the car; that here there was admittedly no master-servant relationship; that §59 of the Vehicle and Traffic Law did not affect the common law rule in that the section just mentioned applied only to cases where the owner of the car was sued by a third person and not where the owner of the car sued a third person; that therefore the negligence of the bailee of the plaintiff's car could not be imputed to the plaintiff.

Justice Hagarty, dissenting, stated tersely: "If this determination be upheld, it follws that respective owners may each recover against the other where operators to whom each lends his automobile becomes involved in a collision resulting from the negligence of both. Each owner may charge the other with liability for the negligence of that other's operator and yet successfully deny that the negligence of his own operator is imputable to him. I cannot agree that the provisions of §59 of the Vehicle and Traffic Law may be so narrowly construed. The basis of the remedy therein afforded is the statutory enactment entitled 'Negligence of operator other than owner attributable to owner.' It matters not whether that negligence is imputable on the theory of agency or the doctrine of respondeat superior. Psota v. Long Island R.R. Co., 246 N.Y.388, 159 N.E.180, 62 A.L.R. 1163; Good Health Dairy Products Corp. v. Emery, 275 N.Y.14, 17, 9 N.E.2d 758; cf. Gochee v. Wagner, 257 N.Y. 344, 347, 178 N.E.553. The owner '****is responsible for the negligence of the driver of his car****.' Martindale v. Griffin, 233 A.D.510, 514, 253 Supp. 578, 582; affd 259 N.Y.530, 182 N.E.167), because the Legislature has said so. The remedy afforded by §59 of the Vehicle and Traffic Law arises therefrom. A similar consequence is that an owner whose operator is negligent is barred from recovery as against a third person. Secured Finance Co. v. Chicago R.I. &P.Co., 207 Iowa 1105, 224 N.W. 88."

The majority opinion is logically to be sustained but a more realistic approach is to be preferred. Law is more than logic; it is logic imbued with vitality. The legal viewpoint is, or should be, a functional one rather than a narrow one.

Looking at the consequences naturally flowing from the majority's decision we can label them unique if anything. If both operators were bailees at the time of the accident and both were negligent, each owner could recover from the other for the damage to his car. The mathematical result seems to be much akin to the admiralty rule of apportioning the negligence except that instead of prorating on the basis of which was the more negligent, here the basis used is which did the more damage! The doctrine of recovery in inverse proportion to the damage done hardly seems to be related to the modern law of negligence. Our policy has always been to give one party a recovery, but never both.

The majority's opinion attempts to answer this by the statement that such was the rule at common law. Assuming that such was the law, the dissent points out that the Legislature was seeking to wipe out such a situation. True the statute says that the owner shall be liable and responsible for death or injuries to person or property but that is but another way of saying he shall be chargeable with the negligence of the one who drives with his permission. "Every owner****shall be****responsible****." (§59 Vehicle and Traffic Law; underlining mine.)

The policy of the enactment plainly is to create a statutory agency, and through that agency to do away with the old excuse that the driver was using the car for his own benefit. And even though the evil which the statute was aimed at recurred most frequently in the actions against the owner by third persons, yet the situation under discussion was also the deserving recipient of remedy.

The law is that the owner of an automobile is responsible for the negligent operation thereof by a person using that automobile with the owner's consent, express or implied. And that responsibility entails all that it imports. Negligence of the driver is imputable to the owner and a third party who is the defendant in an action by the owner should be able to avail himself of that protection. If the statute is for the benefit of the third party in one instance no reason exists why it should not so operate in a parallel instance.

We may expect in the future a further explanation from our court of final appeal as to the interrelation of non-permission and permission implied in law.

W. A. LeF.

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DEFENDANT'S RIGHT TO APPEAR BEFORE GRAND JURY.- We direct attention to a change in the Code of Criminal Procedure which grants to a person who has reason to believe that a grand jury is investigating a charge that he has committed a crime, the right to appear in his own behalf before such grand jury under certain circumstances.

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The new provision amends §257 of the Code which, prior to the amendment, read as follows: "Grand jury not bound to hear evidence for the defendant, but may order explanatory evidence to be produced.- The grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence, within their reach, will explain away the charge, they should order such evidence to be produced; and for that purpose, may require the district attorney to issue process for the witness."

The bill amending §257 provided:

"§1. Section two hundred and fifty-seven of the code of criminal procedure is hereby amended to read as follows:

"§257. Grand jury not bound to hear evidence for the defendant, but may order explanatory evidence to be produced; defendant may appear in his own behalf under certain circumstances. 1. Except as provided in subdivision two of this section, the grand jury is not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence, within their reach, will explain away the charge, they should order such evidence to be produced; and for that purpose, may require the district attorney to issue process for the witnesses.

"2. When any person has reason to believe that a grand jury is investigating a charge that he has committed a crime, such person, may as a matter of right voluntarily file with the foreman of the grand jury and with the district attorney of the county, a request that he be heard in person before such grand jury with reference to such charge; such request shall be personally served on both the foreman of the grand jury and on the district attorney. Before finding an indictment, in case such a request is so filed the grand jury or the district attorney upon the request of the grand jury shall serve in person or shall send by mail to the address given in such request a notice to the effect that such person will be heard by the grand jury at a given time and place and, before finding an indictment, shall hear such person if he appears at the time appointed, and need not hear any witness on his behalf unless the grand jury so desires, and may permit him to testify under oath and give evidence in his own behalf and may cross-examine him if he so testifies. He shall be allowed to appear and testify only if he executes, acknowledges and files with the county clerk a waiver of immunity as provided in section twenty-four hundred forty-six of the penal law and serves a copy thereof on the district attorney. In case an indictment is found against such person by the grand jury upon which the request was served in violation of this sub-division it shall be set aside by the court upon motion made by the defendant at or before the time of pleading thereto. Nothing herein contained shall prevent the court from directing that the case be submitted to another grand jury. If the case be considered by another grand jury, it shall not be required to hear the defendant unless a further written request is made upon such grand jury in the manner prescribed by this subdivision.

"Section 2. This act shall take effect immediately."

This change was approved by Governor Herbert H. Lehman on April 21, 1940. It thereby became Chapter 643 of the Laws of 1940. In commenting on the measure, the Governor wrote:

"This bill gives any person who learns that a grand jury is investigating a criminal charge against him the right to appear before the grand jury and give evidence in his own defense, provided he waives immunity.

"Such a person may be able to give a perfecly satisfactory explanation of suspicious circumstances and thus avoid an indictment damaging to his reputation in spite of an eventual acquittal.

"This bill seems to me to be in the interests of justice and a proper protection to an innocent person.

"I am pleased to approve this bill."

R. B. B.

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